Michael K. Jeanes, Clerk of Court
*** Filed ***
07/23/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000176-001 DT 07/17/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA SETH W PETERSON

v.

ELIZABETH JANE SCARANO (001) THOMAS M HOIDAL

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

HIGHER COURT RULING / REMAND

Lower Court Case Number M–0751–TR–2012–005259.

Defendant-Appellee Elizabeth Jane Scarano (Defendant) was charged in Scottsdale Municipal Court with driving under the influence and driving under the extreme influence. The State contends the trial court erred in granting Defendant's Motion for Reconsideration after it had denied her Motion To Suppress. For the following reasons, this Court reverses and vacates the ruling of the trial court.

I. FACTUAL BACKGROUND.

On March 2, 2012, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2). The State later filed an amendment charging Defendant with driving under the extreme influence, A.R.S. § 28–1382(A)(1), alleging a BAC of 0.179. On January 22, 2013, Defendant's attorney filed a Motion To Suppress contending as follows:

> While the officers may claim that they never crossed the threshold of the garage, they clearly effected a constructive entry by demanding on numerous occasions, perhaps at gunpoint, that Scarano exit the garage. When officers summon the defendant to exit the home, and act with such a show of authority that defendant reasonably believes she has no choice but to comply, a constructive in-home seizure occurs.

(Motion To Suppress, dated Jan. 22, 2013, at 4.) For authority, Defendant's attorney cited, among others, *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985).

At the hearing on Defendant's motion held May 15, 2013, (14 months after the event in question), Officer Greg Loveless testified that Scottsdale Police received a 9-1-1 call on March 2, 2012, from a reporting party (RP), who gave her first and last name. (R.T. of May 15, 2013, at 9, 23–24.)

7The RP said she was in the drive-thru at a McDonald's at Indian School Road and Hayden Road when the vehicle behind her hit her vehicle. (*Id.* at 19–20.) She gave the make and color of the vehicle and described what the driver was wearing. (*Id.* at 20, 23.) The RP spoke to the driver of the vehicle and asked her to move back, but the driver "really didn't seem to even, like, comprehend that," with the result that the RP gave the opinion that there was "a drunk driver behind me." (*Id.* at 19–20.) The driver then pulled out of the line and headed east on Indian School Road, and the RP followed. (*Id.* at 21.) The vehicle was traveling in both lanes on Indian School Road, and then turned left onto Granite Reef Road. (*Id.* at 21–22.) The RP did not follow the vehicle down Granite Reef Road. (*Id.* at 22–23.)

Officer Loveless was on Indian School Road, and when he turned onto Granite Reef Road, he could see the taillights of the vehicle. (R.T. of May 15, 2013, at 11.) As he was closing on the vehicle, it turned right onto Camelback Road, and when he caught up to the vehicle, he could see it matched the description of the vehicle in the 9-1-1 call. (*Id.* at 13–15.) At approximately the 8600 block of Camelback Road, Officer Loveless activated his emergency lights. (*Id.* at 15.) The vehicle slowed but did not stop, and continued until it turned into a driveway at 8715 East Camelback Road. (*Id.* at 15–17, 25, 52.)

As the vehicle was in the driveway, the garage door went up, and the vehicle went into the garage. (R.T. of May 15, 2013, at 18, 27, 52.) Officer Loveless pulled his vehicle into the driveway with his emergency lights still on. (*Id.* at 17–18, 27.) Officer Kerby arrived shortly after that. (*Id.* at 27.) The officers walked up to the garage but did not enter it, and yelled commands for the driver to exit the vehicle. (*Id.* at 28, 30, 38–39, 57.) Neither officer had drawn his weapon. (*Id.* at 30, 39–40, 42.) After about 2 or 3 minutes, the driver exited the vehicle, and Officer Loveless identified Defendant as the driver. (*Id.* at 28–29, 59.) Defendant then walked out of the garage and spoke to the officers. (*Id.* at 29, 37.) There was no door in the garage that led into the house, but there was a door that led to the front of the house and a door that led to the back yard. (*Id.* at 32.) Officer Loveless said that, if Defendant were able to get out of their view, such as going into the house, she might have been able to drink alcohol to mask the alcohol consumed prior to driving, which is why they wanted to make contact with Defendant. (*Id.* at 36–37.) Defendant was transported to the police station, and ultimately her blood sample was drawn pursuant to a search warrant. (*Id.* at 82.) After presenting two other witnesses who testified about other matters, the State rested. (*Id.* at 125.)

The trial court resumed the hearing on October 30, 2013 (5½ months later). Defendant called Officer Travis Kerby as a witnesses, who gave approximately the same description of events as did Officer Loveless. (R.T. of Oct. 30, 2013, at 137–44, 152–54, 173, 175–76.) Defendant testified and gave a version somewhat different from that given by Officer Loveless and Officer Kerby. (*Id.* at 213–18, 229–32.) Defendant acknowledged the testing of her blood sample showed a BAC of 0.179. (*Id.* at 224–25.) After Defendant rested and the State present no rebuttal, the trial court continued the matter for oral argument. (*Id.* at 239–40.)

When the hearing resumed the next month, the prosecutor argued there was no violation of *Payton v. New York* because the officers did not enter Defendant's garage. (R.T. of Nov. 20, 2013, at 263–66.) The prosecutor further argued that, because the officers obtained Defendant's blood sample by means of a search warrant, the case was controlled by *New York v. Harris*. (*Id.* at 269–71.) Defendant's attorney argued that, even though the officers did not enter the garage, their actions were a constructive entry, arguing *United States v. Al-Azzawy* as authority. (*Id.* at 278.) At the conclusion of the arguments, the trial court took the matter under advisement. (*Id.* at 297.) Over 2 months later, the trial court denied Defendant's Motion To Suppress with the following written ruling:

> Defendant Scarano has filed a Motion To Suppress as well as a Motion to Dismiss for Outrageous Police Conduct.
>
> The Court has reviewed the pleadings of both parties along with exhibits that were admitted during the evidentiary hearings that were held concerning the issues presented.
>
> After careful consideration of all the facts and relevant application of the legal principals [*sic*], the Court Denies Defendant's Motion to Suppress as well as the Motion to Dismiss for Outrageous Police Misconduct.
>
> . . . .
>
> As it relates to the Defendant's Motion to Suppress, the Court does not find that there was a Constitutional violation of the Defendant's rights. The facts bear out that the Defendant was allegedely [*sic*] involved in a crime of hit and run at a local drive thru restaurant. The Defendant did not remain at the scene and left. A 911 call was made regarding the crime with a description of the Defendant's vehicle and license plate. A Scottsdale police officer spotted the car, followed it and turned on his emergency lights for the stop prior to the Defendant pulling into her driveway and ultimately her garage. The officers approached the garage but did not enter and required the Defendant to exit her car as well as her garage.
>
> The Court finds that the Officers had the ability to stop the Defendant for an actual or suspected violation of Title 28.

(Ruling, dated Feb. 4, 2014.)

On September 3, 2014, (7 months later), Defendant's attorney filed a Motion for Reconsideration of Motion To Suppress based solely on a case that had just been issued by the Ninth Circuit, *United States v. Nora*, 765 F.3d 1049 (9th Cir. Aug. 28, 2014). After the State filed a Response and Defendant's attorney filed a Reply, the trial court heard arguments and took the matter under advisement. (R.T. of Oct. 15, 2014, at 299, 302, 306, 309.) The trial court later granted Defendant's Motion for Reconsideration with the following written ruling:

> The Defendant's motion for reconsideration to suppress the blood test results is Granted.

(Ruling, dated Oct. 20, 2014.) On October 23, 2014, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did good cause exist for the trial court to reconsider an issue it had previously determined.*

Based on Defendant's Motion for Reconsideration of Motion To Suppress, the trial court reconsidered an issue it had previously determined. The applicable rule of procedure provides as follows:

> **d. Finality of Pretrial Determinations.** Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered.

Rule 16.1(d), ARIZ. R. CRIM. P. For three reasons, this Court concludes the trial court erred in granting Defendant's Motion for Reconsideration.

First, Rule 16.1(d) precludes a trial court from reconsidering an issue it had previously determined unless there is a showing of "good cause." In the present case, the trial court granted Defendant's Motion for Reconsideration with a simple one-sentence ruling, but made no finding of "good cause." The trial court therefore did not comply with the rule.

Second, Defendant failed to make a showing of "good cause" for the trial court to reconsider its previous ruling. In *State ex rel. Romley v. Superior Court (Ochoa),* 183 Ariz. 139, 901 P.2d 1169 (Ct. App. 1995), the court held that, when a first judge had granted the State's motion to try the defendant *in absentia,* when a second judge took over the calendar because of judicial rotations, that was not "good cause" for the second judge to reconsider the issue when the law and the facts had not changed:

> If no new circumstances have arisen, a second trial judge should not review the ruling of the first judge; such a practice wastes judicial resources and encourages "judge shopping."

183 Ariz. at 142, 901 P.2d at 1172. In the present case, there was no change in the law. The sole basis for Defendant's Motion for Reconsideration was the (then) recent opinion in *United States v. Nora,* 765 F.3d 1049 (9th Cir. Aug. 28, 2014), which held as follows:

> The government properly concedes that the police arrested Nora "inside" his home for purposes of the *Payton* rule. Although officers physically took Nora into custody outside his home in the front yard, they accomplished that feat only by surrounding his house and ordering him to come out at gunpoint. We've held that forcing a suspect to exit his home in those circumstances constitutes an in-home arrest under *Payton. See, e.g., Fisher v. City of San Jose,* 558 F.3d 1069, 1074–75 (9th Cir.2009) (en banc); *United States v. Al–Azzawy,* 784 F.2d 890, 893 (9th Cir.1985). Since the officers didn't obtain an arrest warrant, Nora's arrest violated the Fourth Amendment unless an exception to the warrant requirement applies.

765 F.3d at 1054. *Nora* was merely an application of the law established in 1985 in *Al–Azzawy,* which Defendant had cited in her Motion To Suppress and argued to the trial court. (R.T. of Nov. 20, 2013, at 278.) Because *Nora* did not change anything, it did not provide "good cause" for the trial court to reconsider its previous ruling.

Third, Arizona courts "are not bound by the Ninth Circuit's interpretation of what the Constitution requires." *State v. Montano*, 206 Ariz. 296, 77 P.3d 1246, ¶ 1 n.1 (2003). Thus, the Ninth Circuit's opinion in *Al–Azzawy* did not establish the law in Arizona, and neither did the Ninth Circuit's opinion in *Nora.* Thus, the (then) recent opinion in *Nora* did not give the trial court "good cause" for it to reconsider its previous ruling.

B. *Did the officer violate Defendant's Fourth Amendment rights.*

Defendant contends the conduct of the officers violated her Fourth Amendment rights. For three reasons, this Court does not agree with Defendant's contention.

First, the State cites several federal and state cases in which the courts have declined to expand the rule in *Payton* beyond the physical entry of a residence. Defendant cites several federal and state cases in which the courts have expanded the rule in *Payton* beyond the physical entry of a residence, but this Court concludes the cases cited by the State are the more persuasive cases. Thus, under the authority cited by the State, the officers' conduct did not violate the rule in *Payton.*

Second, the rule in *Payton* is not absolute. The Court there held as follows:

> We now . . . hold that the Fourth Amendment to the United States Constitution . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

445 U.S. at 576 (citations omitted).

> Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. . . . Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

445 U.S. at 583 (footnote omitted).

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

445 U.S. at 590. Thus, entry without a warrant is allowed if there exist exigent circumstances. In determining whether exigent circumstances existed in the present case, this Court is guided by *Missouri v. McNeely,* 133 S. Ct. 1552, L. Ed. 2d (2013), which held as follows:

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

133 S. Ct. at 1556.

> To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. See *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (concluding that a warrantless seizure of a person to prevent him from returning to his trailer ***to destroy hidden contraband*** was reasonable "[i]n the circumstances of the case before us" due to exigency).

133 S. Ct. at 1556 (emphasis added, other citations omitted). In his concurring and dissenting opinion, Chief Justice Roberts gave the following proposed rule:

> In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. ***That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant.*** The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.

133 S. Ct. at 1569 (emphasis added). The plurality declined to adopt this "modified *per se* rule" and instead considered that as part of its "traditional totality of the circumstances analysis":

> Although we agree that delay inherent to the blood-testing process is relevant to evaluating exigency, we decline to substitute THE CHIEF JUSTICE's modified *per se* rule for our traditional totality of the circumstances analysis.

133 S. Ct. at 1563.

It thus appears the potential for the imminent destruction of important evidence is an exigent circumstance that would justify the warrantless entry into the home. In the present case, the imminent destruction of important evidence would not have been caused just by the metabolization of alcohol in the bloodstream, it could have been caused by Defendant's actions. Officer Loveless said that, if Defendant had been able to get out of their view, such as going into the house, she would have been able to drink alcohol to mask the alcohol consumed prior to driving, thereby destroying the important evidence of her BAC at the time of her driving. (R.T. of May 15, 2013, at 36–37.) Thus, if the officers' actions could be considered a constructive entry or in-home seizure, that action was justified by the exigent circumstance of the potential destruction of evidence.

This Court notes that, in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the Court held the potential destruction of the blood alcohol evidence was not an exigent circumstance that justified the warrantless entry into the suspect's home. In that case, however, Wisconsin had chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment was possible, thus the minor nature of the offense did not justify the warrantless entry. 466 U.S. at 754. Arizona, on the other hand, classifies driving under the influence and driving under the extreme influence as criminal offenses for which a defendant may be sentenced to a term in jail. The situation in Arizona is thus different from that in Wisconsin.

Third, in *New York v. Harris,* 495 U.S. 14 (1990), the police arrested Harris in violation of *Payton,* but the Court refused to suppress Harris's subsequent confession given at the police station after receiving the *Miranda* warnings:

> For present purposes, we accept the finding below that Harris did not consent to the police officers' entry into his home and the conclusion that the police had probable cause to arrest him. It is also evident, in light of *Payton,* that arresting Harris in his home without an arrest warrant violated the Fourth Amendment. But, as emphasized in earlier cases, "we have declined to adopt a '*per se* or "but for" rule' that would make inadmissible any evidence, ***whether tangible or live-witness testimony,*** which somehow came to light through a chain of causation that began with an illegal arrest." Rather, in this context, we have stated that "[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." In light of these principles, we decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.

495 U.S. at 17 (emphasis added). In the present case, the officers had probable cause to arrest Defendant for leaving the scene of a collision involving damage to a vehicle and for driving under the influence, and obtained Defendant's blood sample pursuant to a valid search warrant. This Court therefore concludes, under *Harris,* this "tangible" evidence was not subject to exclusion.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court ruled correctly when it denied Defendant's Motion To Suppress with its ruling on February 4, 2014. This Court further concludes the trial court erred when it granted Defendant's Motion for Reconsideration with its ruling on October 20, 2014.

IT IS THEREFORE ORDERED reversing and vacating the ruling of the Scottsdale Municipal Court issued on October 20, 2014, granting Defendant's Motion for Reconsideration.

IT IS FURTHER ORDERED affirming the ruling of the Scottsdale Municipal Court issued on February 4, 2014, denying Defendant's Motion To Suppress.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

071720151350•